No. (1)

Supreme Court, U.S.
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October Term, 1997

MICHAEL LEVINE,

Petitioner,

- against -

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Due Process clause of the Fifth Amendment to the U.S. Constitution requires that a defendant in a civil proceeding be accorded the opportunity for an evidentiary hearing prior to the district court's exercise of its discretion to award statutory treble damages?

Whether the grant of summary judgment by the district court and the affirmance contravenes this Court's holding in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1979), that materiality in securities fraud cases is presumed to be an issue of fact to be reserved for the jury?

Whether the award of treble damages under the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. Sec. 78u-1(a) is fundamentally unjust?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit filed March 20, 1998 and attached hereto in the Appendix at A30.

The bench opinion of the Hon. John G. Koeltl, United States District Court for the Southern District of New York, dated July 30, 1996 and attached hereto in the Appendix at A1.

The order of the Hon. John G. Koeltl, United States District Court for the Southern District of New York, dated July 30, 1996 and attached hereto in the Appendix at A22.

The order and judgment of the Hon. John G. Koeltl, United States District Court for the Southern District of New York, dated January 27, 1997 and attached hereto in the Appendix at A24.

STATEMENT OF THE CASE

Background

This case arises from a series of trades made by petitioner Michael Levine in the stock of DeSoto, Inc., a publicly traded paint manufacturer located in Des Plaines, Illinois. Mr. Levine made the trades in two groups, the first being from October 26 to October 30, 1989, which he sold on November 1, 1989, and the second on November 9, 1989, which he sold on the following day, November 10, 1989.

A. The proposed tender offer for DeSoto, Inc.

Beginning in February 1989, DeSoto had been the subject of an investor group's attempt to gain control of a majority of DeSoto common stock. The group, Sutton Holdings (hereafter Sutton), was founded by two principals, William Spier and Michael Zurawin in or about November 1988.

On February 6, 1989 Spier and his investor group announced a tender offer for DeSoto at $50.00 per share. News reports followed. Spier's group also contracted with an investment partnership, Shufro, Rose and Ehrman (Shufro), to buy or find a buyer for Shufro's own 590,000 share stake in DeSoto which would give the Spier group a 14.7 per cent interest in DeSoto. On February 10, 1989, Spier filed a required Schedule 13D statement setting forth details of the proposed merger. News reports also followed the 13D filing.

On February 8, 1989, DeSoto's chairman, Richard Missar, rejected Spier's proposal. DeSoto shares began to drop in value. On February 11, 1989, it was reported that Spier had begun "to examine alternative ways to acquire DeSoto." On February 21, 1989, the *Chicago Tribune* reported that DeSoto's board had adopted anti-takeover defenses.

Spier's February 10, 1989 13D statement disclosed that the source of the funding for the tender offer was to be the Sutton group's own resources "as well as financing provided by investment banks and commercial banks." News coverage of the Spier bid, as well as additional 13D filings, continued from February through June, 1989, but indicated no progress in the Spier group's efforts to obtain sufficient financing. On June 5, 1989, *Crain's Chicago Business* reported that Spier had been unsuccessful in trying to broker Shufro's stake to another investor group. On June 16, 1989 Shufro terminated Spier's

option to purchase or find a buyer for Shufro's 14.7 per cent stake in DeSoto.

Three days later, on June 19, 1989, Spier filed a fourth amendment to the Schedule 13D stating that the group's takeover efforts were continuing. The following day, June 20, 1989, the *Wall St. Journal* reported that takeover hopes for DeSoto had "dimmed". The *Wall St. Journal* report was followed by a series of articles and reports discounting the likelihood of a takeover. Ten days before Spier's actual commencement of a tender offer, PaineWebber in its October 31, 1989 research update on DeSoto, reported that the case for a takeover "is weakened by [DeSoto's] diminished book value...and its latest increase in debt-equity ratio..." Although acknowledging takeover rumors, PaineWebber, however, acknowledged takeover rumors that appeared to have driven up DeSoto's share price.

B. Levine's purchase of DeSoto stock

In the midst of this scenario, on October 23, 1989, Levine met a friend, Mark Surrey, a practicing gynecologist from Los Angeles, at the Arcadia restaurant in New York. Levine characterized the dinner in his deposition as two friends "catching up" since their last meeting. During the dinner, Surrey told Levine that Michael Zurawin had met with him in Los Angeles and told Surrey that he [Zurawin] was looking for people to invest in a company called DeSoto. Surrey did not further describe his conversation with Zurawin and Levine did not make any inquiry of Surrey as to the conversation. Surrey testified in deposition that Zurawin did not tell him the nature of the investment or of the transaction and that Surrey

had no knowledge that Zurawin was referring to a possible acquisition of DeSoto.

After his broker advised him that there were takeover rumors on Reuters as to DeSoto, Levine ordered his two brokers to purchase shares on his behalf. Levine testified that Surrey's statement was "a contributory circumstance" to his buying the stock, but that he ordered his brokers to purchase the stock only after he read in the newspapers that the Shufro group had decided to increase its holdings in DeSoto.

Levine testified in his deposition that even before his dinner with Surrey he had read of high trading volume in DeSoto stock and was aware of the original announcement in February that Spier's group was interested in an "offer" for DeSoto. Levine testified that his decision to buy DeSoto stock was based on continuing publicity as to "a group [Shufro] that were buying stock in this entity..."

Levine expressly denied that he purchased the stock based on what Surrey had told him at dinner: "I did it on an array of things, having seen DeSoto's name in the newspaper, which connected with me, and then hearing what I heard from Surrey, that was a catalyst, and then checking the Reuters." Levine said he had been following the stock even prior to the dinner with Surrey.

Separately, several months earlier, in the summer of 1989, Zurawin had asked Levine if Levine would be interested in investing $500,000 in an unnamed company. Levine testified that Zurawin did not identify any particular company or the nature of the investment. Levine told Zurawin he would not invest any money with him.

Subsequent to the Surrey dinner, Levine purchased, between October 26, 1989 and October 30, 1989, a total of 9,500 DeSoto shares at a cost of $353,847.94. He sold these shares on November 1, 1989 for a total profit of $8,098.72. He testified that he sold the shares because of newspaper reports that DeSoto was divesting one of its divisions, which would make it a less likely takeover subject. On October 31, 1989 DeSoto did announce that it was implementing a restructuring of its business in an effort to accelerate growth. This was the divestiture that Levine said had prompted him to sell out of the stock.

After selling the DeSoto shares, Mr. Levine testified that he continued to watch the stock. On or about November 8, 1989, Levine received a telephone call from Zurawin. Levine testified that he does not recall the specific content of Zurawin's statement but that "It was something like, you know, something he was working on was going to be in the newspaper. So I put two and two together."

Mr. Levine testified that even before Zurawin's call he had been following the stock and its trading volume and that Zurawin's call "was like a catalyst". He said Zurawin's call was "contributory" to his decision to buy the stock a second time "plus the period between the time that I sold the second time and I purchased it", referring to the price and sales volume that he had been following from November 1 to November 8, 1989. Levine testified that he believed this information was public record since there were discussions as to the price movement on Reuters and articles as to the failed takeover attempt in February 1989.

As with his first purchase in October, Levine did not buy any DeSoto stock until after he made a Reuters search on DeSoto. After being advised by his broker that there had been price movement reported on Reuters, Levine instructed his brokers the next day, November 9, 1989, to purchase a total of 11,000 shares of DeSoto stock at a cost of $448,203.97. Later in the day on November 9, 1989, Sutton Holdings announced a tender offer for the outstanding shares of DeSoto, Inc. On November 10, 1989, Levine sold his DeSoto shares on November 10, 1989 for a profit of $73,724.21.

The Proceedings Below

The Commission filed a Complaint against Mr. Levine and two other parties, Edward Cantor and David Schwartz, in the United States District Court for the Southern District of New York. Cantor and Schwartz settled their claims and did not participate in the proceedings.

The Commission alleged that Mr. Levine violated sections 10(b) and 14(e) of the Securities Exchange Act of 1934 (the Exchange Act), 15 U.S.C. 78j(b) and 78n(e), and Rules 10b-5 and 14e-3, 17 C.F.R. 240.10b-5 and 240.14e-3 by trading in the stock of DeSoto while allegedly in the possession of material, non-public information relating to a prospective tender offer. A2.

Specifically, the Commission alleged that Mr. Levine contravened Rule 14e-3 on two occasions: 1) by trading in the stock of DeSoto between October 26 and October 30, 1989 subsequent to his dinner conversation with Dr. Surrey; and 2) by trading in the stock of DeSoto on or about November 9,

1989 subsequent to the November 8, 1989 telephone call from Zurawin. A2.

The Commission moved for summary judgment on the ground that the statement made by Surrey to the effect that Zurawin was looking for investors in DeSoto and the later statement by Zurawin that something "he was working on was going to be in the newspapers", represented material, non-public information relating to a tender offer. The Commission sought summary judgment as to its claims under Section 14e of the Exchange Act and Rule 14e-3, 17 C.F.R. 240.14e-3, which prohibit trading in the securities of a company that is the subject of an anticipated tender offer while in possession of material non-public information relating to such tender offer.

After briefing and oral argument, the district court denied the Commission's motion for summary judgment as to Mr. Levine's trades made between October 26 and October 30, 1989 subsequent to the dinner conversation with Dr. Surrey. The court held that there were material issues of fact as to whether the information conveyed by Dr. Surrey was already in the public domain. A11, A13. The court held that Spier's 13D filing had already identified the fact that Zurawin was a member of Sutton Holdings and that Sutton was seeking investors from the general public to finance a takeover bid for DeSoto. On this basis, the district court concluded that there was a material issue of fact as to whether Surrey's statement that Zurawin was looking for investors in DeSoto was already in the public domain. A10-A13.

The district court also found that there were issues of fact as to whether Mr. Levine was liable for allegedly "tipping" such

information to David Schwartz and Edward Cantor, both of whom chose to settle with the Commission. A16-A17. The Commission did not appeal this denial of summary judgment and later voluntarily dismissed the "tipping" claims. A33.

With respect to the second series of trades on November 9, 1989, which were made after Mr. Levine's November 8, 1989 telephone call with Zurawin, the trial court granted summary judgment in the Commission's favor. A13-A16. Although Zurawin at no time conveyed the name of any company in which he was seeking investment, never identified DeSoto, never told Levine that he was engaged in a takeover effort or identified what type of matter he thought "was going to be in the newspapers", the trial court nevertheless held that Zurawin's telephone call of November 8, 1989 conveyed "material non-public" information upon which Mr. Levine was prohibited from trading.

Despite the absence of any information actually conveyed by Zurawin in his telephone call or on any other occasion, the trial court held that the meaning of this telephone call was "unquestionably clear: a transaction relating to DeSoto was about to be announced." A15. On this basis, the trial court granted summary judgment to the government and awarded damages in the form of $73,724.21 in compensatory damages.

And, without holding an evidentiary hearing, without giving Mr. Levine any opportunity to testify in person or address the court, and without giving Mr. Levine the chance to offer the testimony of other persons who knew of his actions and motivations, the district court entered a maximum three-times penalty in the amount of $221,172.63, which with interest,

yielded a total judgment of $358,752.71, as well as injunctive relief. A26.

This maximum penalty, entered with not evidentiary hearing, was imposed upon a defendant who had no prior violations of any type in his securities trading, never solicited or sought out any of the information he received, never tipped or offered such information to any other person and, in the nine years since these allegations arose, has had a perfect trading record with no violations of any kind. The imposition of such maximum penalty under such circumstances, with not even a minimal due process hearing, gives rise to the instant application for Certiorari.

The judgment was affirmed in its entirety by the U.S. Court of Appeals for the Second Circuit. A30-A33. The Court of Appeals, however, appeared to question the propriety of the monetary penalty award when it said: "The question before this Court is not whether we would have imposed a different penalty, but whether the penalty imposed was within the range of reasonable options available to the district court." A32-33.

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was filed on March 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

The Due Process Clause of the United States Constitution, U.S. Const., Amendment 5, provides, in part:

> No person shall...be deprived of life, liberty or property without due process of law...

B. Statutory Provisions

Section 78u-1(a) of the United States Code provides, in part:

(a)(1) Whenever it shall appear to the Commission that any person has violated any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, non-public information...the Commission –

> (A) may bring an action in a United States district court to seek...a civil penalty to be paid by the person who committed such violation;

(2) The amount of the penalty which may be imposed on the person who committed such violation shall be

determined by the court in light of the facts and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication.

REASONS FOR GRANTING THE WRIT

The Due Process clause of the Fifth Amendment to the U.S. Constitution requires that there be no taking of "life, liberty or property" without notice and an opportunity to be heard. The District Court below determined that there was no issue of fact as to the Petitioner's liability under 17 C.F.R. 240.14e-3 and accordingly no evidentiary hearing was held as to the liability issues.

The Petitioner, however, was accorded no evidentiary hearing as to the very different question of whether the district court should exercise its discretion to award the maximum treble damages under the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA), 15 U.S.C. Sec. 78u-1(a).

ITSFEA, the statute under which the penalty was imposed, authorizes the court to award a penalty in cases of insider trading of up to three times the profits gained "under the facts and circumstances" of each case. 15 U.S.C. 78u-1(a). The determination of such question involves issues of credibility, intent and motivation of the defendant, none of which were resolved (or could be) upon the grant of summary judgment. Consequently, the exercise of such discretion is an inherently subjective determination, subject under this Court's jurisprudence to an evidentiary hearing.

Under this Court's prior jurisprudence, the need for an evidentiary hearing under due process principles increases in proportion to the subjectivity of the inquiry and the likelihood of an erroneous finding. Despite the fact that the district court found that the defendant's conduct was "egregious" and that "he has shown no remorse", he was never given the opportunity to testify as to his actions before the court or to offer the evidence of other persons as to his intent, motivation and good faith, all of which are crucial issues in determining the need for a penalty under ITSFEA.

The district court thus rendered a finding as to the need for punishment without giving the defendant the opportunity to persuade the court by his demeanor and by his own testimony and that of other witnesses as to whether or not he was deserving of further punishment and as to whether his actions reflected bad faith or a mere mistaken understanding of his rights and obligations under the law.

The Court afforded itself nothing other than the dry testimony of the deposition transcripts and affidavits and could not evaluate his credibility, good faith and demeanor by observation in open Court. The failure of the district court to afford such hearing prior to imposing the maximum triple penalty violated the defendant's due process rights under the Fifth Amendment and represents a procedural defect of Constitutional dimensions.

I.

THE DISTRICT COURT'S FAILURE TO ACCORD AN EVIDENTIARY HEARING BEFORE IMPOSING A MAXIMUM TRIPLE PENALTY VIOLATED THE DEFENDANT'S RIGHTS TO DUE PROCESS UNDER THE FIFTH AMENDMENT.

In promulgating ITSFEA, Congress gave the district courts the power to impose a penalty of up to three times the trading profits. 15 U.S.C. 78u-1(a). In determining whether to impose such penalty, Congress enabled the court to rely upon its discretion based upon the "facts and circumstances" of the case. *Id.*

ITSFEA represents a departure from other federal trebling provisions, all of which are mandatory upon a finding of liability on the principle claim. *See e.g.*, Sherman and Clayton Acts, 15 U.S.C. 1-15, et seq; Lanham Act, 15 U.S.C. 1117. In such other statutory frameworks, the district court has no discretion as to the penalty and must enter a mandatory award. Thus, the question of whether the court must afford an evidentiary hearing prior to the imposition of triple damages has not previously arisen since the imposition of the penalty in other fields is automatic and follows directly from a liability finding.

The Court has addressed the evidentiary requirements of a civil due process hearing in the context of state or federal administrative proceedings. *See e.g., Goldberg v. Kelly,* 397 U.S. 254 (1969); *Mathews v. Eldridge,* 424 U.S. 319 (1976).. The Court has not had the opportunity to decide whether an award of a monetary penalty upon a grant of summary

judgment with no opportunity for a personal appearance by the defendant or other witnesses violates due process considerations.

In *Goldberg v. Kelly, supra,* the Court held unconstitutional a state procedure under which welfare benefits could be terminated with no right to a personal appearance by the recipient before the hearing officer who would make the determination. *Id.* at 268. The Court held that due process requires an opportunity for an oral presentation by the interested party. "Particularly where credibility and veracity are at issue...written submissions are a wholly unsatisfactory basis for decision". *Goldberg* at 269.

The Court in *Goldberg* made it clear that such considerations apply "in almost every setting where important decisions turn on questions of fact,..." *Goldberg* at 269, *citing ICC v. Louisville & NR Co.,* 227 U.S. 88, 93-94 (1913), and *Willner v. Committee on Character & Fitness,* 373 U.S. 96, 103-104 (1963). Since Congress itself established that there is a need for the exercise of judicial discretion in determining penalties under ITSFEA, it follows that such considerations "turn on questions of fact", as well as questions of "credibility and veracity", *Goldberg* at 269, due process would require something more than the right to make written submissions to the Court on a motion for summary judgment.

In the case below, the sole evidence received by the district court were written submissions in the form of deposition transcripts and affidavits. Because summary judgment was been granted, no trial took place and the court did not hear from any witnesses. The defendant received no opportunity to testify or to explain to the court the reasons for his actions, his

intent at the time or his understanding of the law now that he has been through this litigation. All of these factors are relevant to a determination as to the need for a monetary penalty under ITSFEA.

ITSFEA itself makes no provision for an evidentiary hearing, whether it be an informal personal appearance by the defendant or a more formal trial-type hearing, *i.e., Goldberg, supra,* at which witnesses may be called to testify. Congress' failure to mandate a hearing under ITSFEA effectively means that punitive damages in an amount exponentially greater than compensatory damages may be assessed against a defendant who has no opportunity to appear before a court and explain his actions, intent and motivation, all of which are relevant to any determination as to the need for punishment.

Tull v. United States, 481 U.S. 412 (1987), teaches that while Congress may leave the determination of the monetary penalty to the Court's discretion, *Tull, supra. at 426-427,* such conclusion should take place only after witnesses have testified before the court as to the issues underlying the case. While *Tull* concerned the right to a jury trial as to liability, due process considerations require that the same opportunity in substance be accorded a defendant whose liability has been determined on summary judgment prior to the award of a penalty. At minimum such a hearing must at least give the factfinder an opportunity to evaluate the credibility and demeanor of the defendant before making a decision as to a penalty. It is the existence of such opportunity in *Tull* that eliminates the prejudice that would otherwise arise when the court is empowered to order monetary penalties.

This Court has consistently held that some form of hearing is required "before an individual is finally deprived of a property interest". *Mathews v. Eldridge*, 424 U.S. 319 (1976). The need for an evidentiary hearing increases where the determination rests upon subjective factors or the credibility of witnesses. *Mathews* at 344-345. Due process is not a static doctrine but one that is molded to the needs of a particular case. *Goss v. Lopez*, 419 U.S. 565, 579 (1974). Only where the gravamen of the question does not turn on issues of credibility and veracity does the need for an evidentiary hearing diminishes. *Richardson v. Perales*, 402 U.S. 389, 405,407 (1971); *Mathews* at 344.

Though procedural due process may vary "according to the interests at stake in a particular context, *Bodie v. Connecticut*, 401 U.S. 371, 378 (1971), it is the fundamental requirement that there be "an opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews*, 424 U.S. at 333. In all cases, there must be a prompt opportunity for "complete administrative and judicial review..." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261-262 (1986). A hearing on a motion for summary judgment based on written testimony does not satisfy the need to evaluate the credibility and veracity of witnesses, an essential component of due process. *See Goldberg* at 269.

This issue arises in an important and growing field. Summary judgment has been entered with some degree of frequency under Rules 14e-3 to which ITSFEA has been made applicable. Such cases involve large trading profits which lead to exponentially greater monetary penalties under ITSFEA's treble damages provisions. The prospect of large damage awards, as in the instant case, entered without any

evidentiary hearing aside from the testimony in transcripts and affidavits poses a major affront to due process considerations. Moreover, this Court's recent affirmance of the constitutionality of Rule 14e-3, *United States v. O'Hagan*, No. 96-842, 521 U.S. __, 138 L Ed 2d 724, 117 S Ct __ (1997), will almost certainly lead to its greater employment by the government in insider trading cases, with a concomitant increase in the application of the treble damages provision under section 15 U.S.C. 78u-1.

The review of testimony from transcripts does not satisfy the requirement of due process. "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1984). Surely, this precept applies just as equally to a trial judge reading a transcript or affidavit on a motion for summary judgment as it does to an appellate court reviewing a record on appeal.

Due process considerations require that to determine the true intent or motivation of a defendant, or his propensity to commit the same or similar act in the future, the trial judge must listen to the defendant in open court so as to properly evaluate his demeanor and credibility, even where liability has otherwise been established on summary judgment. These considerations are particularly important in a punitive damages case where the factfinder "...must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it". *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993).

II

BY THE GRANT OF SUMMARY JUDGMENT, THE COURTS BELOW MISAPPLIED THIS COURT'S PRIOR HOLDING IN *TSC Industries v. Northway, Inc.*, 426 U.S. 438 (1976).

The oblique nature of Zurawin's statements in the November 8, 1989 telephone conversation, combined with the dearth of actual information Levine had, Cf., SEC v. Cherif, 933 F.2d 403, 412-413 (7th Cir. 1991), renders this a matter for the ultimate trier of fact. Summary judgment as to the November 9, 1989 stock purchases was improvidently granted and deprived the defendant of his right to a jury trial.

It was undisputed that in the November 8, 198 telephone call, Zurawin made a statement to the following effect: "something he [Zurawin] was working on was going to be in the newspaper." The district court concluded that this statement, that something Zurawin was "working on was going to be in the newspaper", constituted material, non-public information on which Mr. Levine was prohibited from trading under Rule 14e-3, 17 C.F.R. 240.14e-3. Despite its vague, insubstantive nature, the district court concluded that Zurawin's statement had particular meaning for Levine as a result of the context in which Levine received the information. The essence of the bench ruling is as follows:

> Levine had been friends with Zurawin for fourteen years. He was approached earlier that year by Zurawin about a possible investment. Levine testified that he believed Zurawin was involved in financing the accumulation of DeSoto shares, and he

> admittedly was aware of the information Surrey conveyed to him that Zurawin had approached Surrey and possibly Field about an investment relating to DeSoto. Indeed, Levine conceded that Zurawin's telephone call was meaningful in light of what Levine himself already new: "Zurawin's phone call was like a catalyst again. It was something like, you know, something he was working on was going to be in the newspaper. So I put two and two together... Based on Levine's knowledge as of November 8 or 9, the fact that "something" Zurawin was working on was going to become public cannot reasonably be viewed from Levine's perspective as an isolated piece of information concerning an obscure person. To the contrary, the meaning of Zurawin's comment to Levine was unquestionably clear: a transaction relating to DeSoto was about to become public. That information was plainly material and nonpublic. A15.

Thus, despite the vague, unsubstantiated nature of Zurawin's statement to Levine in the November 8, 1989 telephone call, the district court concluded that the meaning of this comment was so "unquestionably clear" that summary judgment should be granted and Mr. Levine deprived of the benefits of trial.

Irrespective of the complete absence of any actual information concerning DeSoto or any particular transaction in Zurawin's November 8, 1989 telephone statement, the district judge ruled that the only possible interpretation a "reasonable investor" would have was that "a transaction relating to DeSoto was about to become public." Id. This was inference by a court sitting on motion for summary judgment and a decision that intruded into the traditional sphere of the jury.

This Court's jurisprudence as to "materiality" firmly establishes that such questions are inherently factual and are "peculiarly for the trier of fact," *TSC Industries v. Northway, Inc.*, 426 U.S. 438 (1976). In such cases, summary judgment is highly disfavored. In *TSC Industries* the Court stated:

> In considering whether summary judgment on the issue is appropriate, we must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.

Summary judgment is to be granted only where the information conveyed 1) "altered the total mix of information available" *and* 2) where it is "so obviously important to an investor" that "reasonable minds cannot differ on the question of materiality". See, TSC Industries, Inc., 426 U.S. at 450. "*Only* if the established omissions are 'so obviously important to an investor" can summary judgment be granted. Id. As *TSC Industries* teaches, summary judgment should be granted *only* where there can be no doubt as to the meaning that reasonable investors would take from the information conveyed.

In *TSC Industries* the Court has imposed a threshold far more stringent than a mere reasonableness test. It is not sufficient under this Court's teachings as to materiality that the

information conveyed *might* be important to investors, but that the information be "so obviously important" that reasonable minds could not differ as to its materiality. *TSC Industries*, 446 U.S. at 446.

Zurawin's statement to Levine was at best a vague, oblique reference. The district court's conclusions as to Levine's understanding of that statement were based entirely on the district court's inferences as to what the court believed Levine understood from Zurawin's statement. Such inferences are appropriately reached only by a trial court, not a district judge reviewing deposition transcripts and affidavits on motion for summary judgment. *See e.g., Anderson v. Bessemer City*, 470 U.S. at 575.

The undisputed facts show that Zurawin did not ever communicate his involvement in the DeSoto tender offer to Levine nor did he ever convey to Levine the name of any company with which Zurawin was involved in a takeover bid or other acquisition. Despite Zurawin's inquiry earlier that summer as to whether Levine would be willing to invest in some unnamed venture, Zurawin on that occasion also failed to describe the venture and did not convey either the name of any company or the nature of any transaction to Levine.

Paradoxically, the district court denied the government's motion for summary judgment as to the earlier set of trades by Mr. Levine in October despite the fact that the information he had then received from his friend Dr. Surrey was far more specific and detailed than Zurawin's later statement. The statement from Surrey was to the effect that Zurawin was looking for people to invest in DeSoto, a communication that not only gave a substantive description to a transaction, but

also identified the name of the target. In contrast, Zurawin's statement, upon which summary judgment *was* granted, was limited to the bare communication that "something he was working on was going to be in the newspapers". The dichotomy between the treatment by the district court of these two communications itself demonstrates the highly factual nature of a finding as to materiality and the inherent injustice of the grant of summary judgment.

There is no precedent for summary judgment as to a question of materiality under either Rule 14e-3 or Rule 10b-5 under circumstances involving generalized information of this nature. The inferences to be drawn from Zurawin's oblique statement and the *publicly* available information Levine had are precisely those "delicate inferences" that this Court has held must be reserved to the trier of fact. *See TSC Industries, supra.* The affirmance directly contravenes that mandate. Moreover, the Second Circuit's approach would appear to be in conflict with a recent decision by the 11th Circuit which recognized that the "fact-intensive" nature of such questions "should be decided by a jury". *See Securities and Exchange Commission v. Adler, et al.*, 1998 U.S. App. LEXIS 6002, *55 (11th Cir. 1998).

In light of the marked departure by the courts below from this Court's standard governing materiality in *TSC Industries*, this Court should grant probable jurisdiction. The growing use of Rule 14e-3 as an enforcement tool by the Securities and Exchange Commission, as well as this Court's recent affirmance of the constitutionality of the rule itself, *see United States v. O'Hagan, supra,* renders the Second Circuit's broadening of summary judgment as to materiality an issue of substantial importance. The resolution of this issue by the

Court will be of great public benefit and an aid to more uniform and equitable enforcement.

III

UNDER THE FACTS OF THIS CASE, THE AWARD OF A MAXIMUM PENALTY IS FUNDAMENTALLY UNJUST AND REQUIRES THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

Assuming, arguendo, that Levine violated Rule 14e-3, his actions are nevertheless among the most benign in the long litany of insider trading litigation. On no occasion did Zurawin convey any information to Levine identifying the name of a company, the fact that it was to be acquired or that an announcement was to be made. To the contrary, Levine was presented with only the vaguest and most inconclusive statement by Zurawin, to wit: that "something he was working on was going to be in the newspaper." Any meaning Levine derived from this statement was as a result of publicly available information and by the process of what he termed was "putting two and two together." In other words, Levine made what can only be viewed as an intuitive guess, an act which is not prohibited under Rule 14e-3.

Far from demonstrating egregious conduct, this pattern shows beyond peradventure that Levine sought to act in a manner that comported with the law as he understood it. He testified that he believed the information he was using was public record. The district court itself held that the information Surrey had given to him in the first series of trades may well have been in the public domain. It was this information, in addition to the marketplace reports that he testified that he had reviewed, that led to his determination to trade after the Zurawin telephone call.

Levine's actions with respect to the telephone call he received from Zurawin also mitigate against a maximum penalty. Despite his long-standing friendship with Zurawin, at no time did Levine solicit Zurawin or make any attempt to learn about Zurawin's affairs. Despite hearing from Surrey that Zurawin was seeking out investors in DeSoto, Levine on no occasion used his friendship with Zurawin to seek out, solicit or inquire as to his activities, even though Levine knew that there were rumors as to takeover activity concerning DeSoto. In this respect, the case differs from other litigations where the defendants traded on multiple occasions, repeatedly abusing personal relations that provided a conduit of specific, definitive information. See, e.g., SEC v. Musella, 678 F.Supp 1060 (S.D.N.Y. 1988).

The court's conclusion that Levine has shown no "remorse" is also improper as a basis for assessing the maximum penalty and demonstrates the danger of a court making inferences in the absence of actual testimony. Levine did not dispute the facts of this case, but argued that the information he received was permissible as a matter of law. The trial court's decision conclusion that Levine has shown a lack of "remorse" is in effect a punishment because Levine exercised his legal right to contest the legal theories underlying the government's case.

Such a decision, if upheld, will be a signal to litigants that they may pursue their right to defend themselves only at the cost of punishing financial penalties. In view of the absence of any evidentiary hearing on such question, the imposition of a penalty for such reasons reflects a further constitutional defect. One should be subject to penalty only because of his objective conduct, not because he availed himself of his legal rights. The imposition of a maximum penalty under such

circumstances and without benefit of an evidentiary hearing was fundamentally unjust and calls for review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the United States Court of Appeals.

Respectfully submitted,

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Michael Levine

June 18, 1998

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

V. 94 Civ. 8079 (JGK)

EDWARD A. CANTOR, MICHAEL LEVINE, and DAVID P. SCHWARTZ,

Defendants.

----------x

July 30, 1996
New York, NY

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

SECURITIES AND EXCHANGE COMMISSION
Attorneys for Plaintiff
BY: ANDREW J. GEIST
GREGORY L. FAKE

BRUCE I. AFRAN
Attorney for Defendants

Decision

THE COURT: All right. This is SEC against Levine resumed. I have listened to argument of counsel, I have read and studied the papers, and I am prepared to rule.

This is a motion for partial summary judgment by the Securities and Exchange Commission, hereafter the SEC, against Michael Levine, one of the three defendants in this civil enforcement action. This motion does not concern either of the other two defendants, who have both entered into settlements.

The SEC brought this suit claiming alleged violations of the Securities Exchange Act of 1934 (the"Exchange Act"), 15 U.S.C. Section 78a, et seq., arising out of trading in the securities of DeSoto, Inc., a consumer paint manufacturer that was the target of a successful tender offer in November 1989. The SEC asserts claims against Levine under Section 10(b) of the Exchange Act, 15 U.S.C. Section 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. Section 240.10b-5, and Section 14(e) of the Exchange Act, 15 U.S.C. Section 78n(e), and Rule 14e-3 promulgated thereunder, 17 C.F.R. Section 240.14e-3. The SEC also seeks a permanent injunction against future Exchange Act violations by Levine pursuant to Section 21(d) of the Exchange Act, 15 U.S.C. Section 78u(d), and civil penalties pursuant to Section 21A of the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. Section 78u-l(a). The SEC now moves for partial summary judgment on its claims against Levine under Section 14(a) and Rule 14e-3, and for a permanent injunction and civil penalties.

There is no dispute with respect to the following facts:

On October 12, 1989, an investor group called Sutton Holding Corp. ("Sutton") was formed by William Spier and Michael Zurawin, among others. On November 9, 1989, after the stock market closed, Sutton issued a press

release announcing it would commence a cash tender offer of $50 per share for DeSoto in five business days. That day, DeSoto shares, which traded on the New York Stock Exchange, closed at $42 5/8 per share. On the following day after heavy trading the stock closed at $47 3/8 per share, an increase of more than 11 percent. Sutton commenced its tender offer on November 14, 1989.

In late October and early November 1989, the defendant Michael Levine made two series of trades in shares of DeSoto. On October 26 and 30, Levine purchased 9,500 shares of DeSoto which he sold on November 1 for a profit of about $8,000. On November 9, prior to the Sutton press release, Levine purchased 11,000 shares of DeSoto which he sold the next day after the Sutton press release at a profit of more than $70,000. The SEC argues that each of these transactions was a violation of Section 14(e) and Rule 14e-3 because at the time the trades were made Levine possessed material, non-public information relating to the tender offer for DeSoto which he knew or had reason to know was nonpublic and acquired from a person acting on behalf of a group that was going to make a tender offer for DeSoto.

There were several contacts between Levine and Zurawin during 1989 which form the basis for the SEC's claims. Levine and Zurawin were personal friends. They had known each other for about 14 years. Levine had attended Zurawin's wedding, and he was a godparent to one of Zurawin's daughters. Levine was aware that Zurawin was a manufacturer's representative in the consumer paint industry and knew that DeSoto was a participant in that industry. During the summer or fall of 1989, Zurawin approached Levine and asked if he would be interested in an investment opportunity requiring about $500,000. Zurawin did not mention the nature of the investment, the name of a company or even the industry involved. Levine declined to invest. Later that year, on or about October 23, Levine had dinner in New York City with Dr. Mark Surrey, a personal

friend of both Levine and Zurawin's. During dinner Surrey told Levine that he had been approached by Zurawin who had asked Surrey if he would be interested in investing in DeSoto. Levine recalled that Surrey may have also mentioned that Zurawin had approached an investor named Ted Field. Levine did not press Surrey for additional information, nor did Levine contact Zurawin after dinner. Instead, Levine contacted his broker and requested information available on wire services such as Quotron and Reuters relating to DeSoto. Levine then purchased 9,500 shares of DeSoto stock between October 26 and October 30 at a total cost of $353,847.94. On November 1, Levine sold all 9,500 shares, realizing a profit of $8,098.72. Levine continued to monitor DeSoto and the behavior of its stock.

On November 8 or 9, Levine received a telephone call from Zurawin. Zurawin explained that something he had been working on would appear in the newspaper. (Deposition of Michael Levine dated April 13, 1995, at 351.) Levine did not ask Zurawin any questions about Zurawin's comment. Shortly after the telephone conversation, on November 9, Levine purchased 11,000 shares of DeSoto stock at a total cost of $448,203.97. The announcement of the Sutton tender offer followed, and the next day Levine sold his 11,000 shares at a profit of $73,724.21.

The November tender offer by Sutton was not the first attempted acquisition of DeSoto during 1989. Earlier that year, William Spier and Zurawin had made an unsolicited offer directly to DeSoto to acquire the company at a price of $50 per share in cash. In connection with this proposal, Spier, who led the attempt, entered into an agreement with Shufro, Rose and Ehrman (hereafter, "Shufro), an investment advisor, to acquire a block of 590,000 shares of DeSoto stock held by Shufro. Zurawin made the proposal to DeSoto's chairman, Richard Missar. In connection with the bid and the agreement with Shufro,

Spier filed a Schedule 13D with the SEC disclosing his beneficial ownership of the 590,000 shares by virtue of the Shufro agreement. Spier's partnership with Zurawin was disclosed as well. There were also numerous press reports of the Spier proposal.

DeSoto rebuffed the proposal by Spier and Zurawin on February 7, 1989. Thereafter, Spier and Zurawin continued to explore a possible acquisition, evidently without success. After numerous extensions, the Shufro agreement was ultimately terminated on June 16, 1989. Spier then filed an amendment to his Schedule 13D on June 9, 1989 disclosing the termination of that Agreement. The amendment also explained that Spier was continuing to explore a possible acquisition. The amendment stated:

"Mr. Spier is continuing to explore and evaluate his alternatives with respect to a possible acquisition of the issuer (DeSoto) or shares of common stock taking into account the termination of the agreement . . . including, without limitation, the possibility of acting with one or more third parties who have expressed an interest in participating in a possible acquisition of (DeSoto) or assisting in providing financing for such a transaction."

(Declaration of Gregory L. Fake, Esq., dated October 27, 1995, Exhibit J, [Schedule 13D Amendment, dated June 16, 1989 at 3.]

Shortly after Spier filed the amendment, the press reported that prospects for a takeover of DeSoto had "dimmed." Nevertheless, DeSoto continued to be the subject of takeover speculation, as reported regularly in the press. The next official announcement from Spier and Zurawin, however, was the Sutton press release on November 9, 1989.

The foregoing facts are undisputed, and based on these facts the SEC now moves for partial summary judgment with respect to its claims under Section 14(e) and Rule 14e-3.

Summary judgment may not be granted unless

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Gallo v. Prudential Residential Servs. Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994). "The trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution." Id., 22 F.3d at 1224.

The moving party bears the initial burden of"informing the district court of the basis for its motion" and identifying the matter that it believes demonstrate the absence of genuine issue of material fact." Celotex, 477 U.S. at 323. The substantive law governing the case will identify those facts which are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether summary judgment is appropriate, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); see also Gallo, 22 F. 3d at 1223.

If the moving party meets its burden, the burden shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). With respect to the issues on which summary judgment is sought, if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper. See Chambers v. TRM Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994).

Section 14(e) of the Exchange Act provides, in relevant part, that it is unlawful "to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders . . . " 115 U.S.C. Section 78n(e). Pursuant to a delegation of rulemaking authority granted by Section 14(e), the SEC promulgated Rule 14e-3, which provides in relevant part:

"If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the 'offering person'), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of Section 14(e) of the [Exchange] Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from (1) the offering person, (2) the issuer of the securities sought or to be sought by such tender offer, or (3) any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities. . ." 17 C.F.R. Section 240.14e-3.

It is not disputed in this case that Sutton had taken substantial steps to commence its tender offer at the time of Levine's first trades in DeSoto shares beginning on October 26, 1986. Nor is it disputed that the information Levine learned from Surrey at the dinner in New York on or about October 23, 1989, and from Zurawin by telephone on November 8 or 9, 1989, related to that tender offer. Finally, Levine does not dispute the SEC's argument that he knew Zurawin was acting on behalf of a group that was taking steps to make a tender offer for DeSoto.

Consequently, the elements of a Rule 14e-3 violation as to which there is a dispute are (1) whether the information Levine came to possess was material, and (2) whether Levine knew or had reason to know that the

information was nonpublic.

A fact is material if there is a substantial likelihood that a reasonably prudent investor would consider it important in making a decision. Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988); TSC Indus., Inc. v Northway Inc., 426 U.S. 438, 449 (1976). ("There must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."); Feinman v. Dean Witter Reynolds, Inc., 84 F.3d 539, 540-41 (2d Cir. 1996); see also SEC v. Maio, 51 F.3d 623, 637 n.17 (7th Cir. 1995) (applying materiality standard from Basic for Section 14(e) and Rule 14e-3 claims.) Where information relates to a contingent event, its materiality depends upon "a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." Basic, 485 U.S. at 238 (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (in banc), cert. denied sub nom Coates v SEC, 394 U.S. 976 (1969)).

Moreover, "because even a hint of an upcoming tender offer may send the price of the target company's stock soaring," SEC v. Materia, 745 F.2d 197, 199, (2d Cir. 1984), cert. denied, 471 U.S. 1053 (1985), a fact relating to "an impending tender offer that has not previously been announced publicly is clearly material information." SEC v.Tome, 638 F. Supp. 596, 623 (S.D.N.Y. 1986); see SEC v. Musella, 748 F. Supp. 1028, 1040 (S.D.N.Y. 1989) ("[N]ews of an impending transaction that is expected to increase the value of a security is especially likely to affect an investor's decision to buy, hold, or sell stock."), aff'd without opinion, 898 F.2d 138 (2d Cir.), cert. denied, 498 U.S. 816 (1990).

Generally, materiality is a mixed question of law and fact, and, as the Supreme Court has instructed:

"In considering whether summary judgment on

the issue is appropriate, we must bear in mind that the underlying objective facts, which will often be free from dispute are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.

TSC, 426 U.S. at 450. Nonetheless, the question of materiality may be decided as a matter of law on a motion if reasonable minds could not differ on the question of the importance of the information at issue. See Feinman, 84 F.3d at 541; see also SEC v. Musella, 678 F. Supp. 1060 (S.D.N.Y. 1988) (granting summary judgment in Section 10(b) case where no material facts were disputed.)

The SEC identifies three pieces of information which Levine learned from Surrey and Zurawin: (1) the identity of DeSoto; (2) the fact that Zurawin had approached Surrey, and possibly Field, about an investment related to DeSoto; and (3) that something Zurawin was working on was going to appear in the newspaper. The SEC actually characterizes the first two pieces of information somewhat differently. The SEC contends that Levine learned from Surrey that DeSoto was a takeover target and that Zurawin had mentioned a "deal" relating to DeSoto when he approached Surrey. Although the SEC's argument did not rely upon that characterization. Levine correctly points out, however, that Surrey himself denies ever having identified DeSoto as the subject of a "deal." In fact, Surrey testified that he knew nothing about the nature of Zurawin's interest in DeSoto. (Deposition of Mark W. Suey, dated June 28, 1992, at 21, 23.) Levine also argues that neither he nor Surrey ever testified that Surrey identified DeSoto as a "target" or as the subject of any sort of acquisition attempt. (Levine deposition at 368-369). Levine argues that he did not acquire from Surrey the information that DeSoto was a

takeover target or that Zurawin was soliciting funds on behalf of a potential acquiror. Levine maintains that these were his own suppositions.

Ultimately, these different characterizations are inconsequential because on a motion for summary judgment such factual differences must be resolved in Levine's favor and all of the reasonable inferences from those facts must be drawn in Levine's favor as well. Accordingly, for the purpose of this motion the information Levine acquired from Surrey amounts to the fact that Zurawin had solicited Surrey for money to invest and that the solicitation related in some way to an investment in DeSoto.

The SEC argues that each of these three items of information was material and, as Levine knew, were nonpublic, thus satisfying the remaining elements of Rule 14e-3, and establishing Levine's liability as a matter of law under that Rule and Section 14(e) of the Exchange Act.

The first two pieces of information were allegedly acquired by Levine from Surrey prior to Levine's first series of trades in DeSoto stock, culminating with the sale of 9,500 shares on November 1, 1989. The third piece of information, however, was allegedly acquired by Levine during his telephone conversation with Zurawin about one week later after Levine had disposed of the 9,500 shares. Levine allegedly possessed the third piece of information just before his second series of trades in DeSoto stock, culminating in the sale of 11,000 shares on November 10, 1989. The two series of trades and the pieces of allegedly material nonpublic information to which each relates require separate analysis.

There are genuine issues of material fact with respect to the materiality of the first two pieces of information relating to Levine's first DeSoto trades. Levine argues separately in his brief that there is a genuine issue of material fact as to whether Levine knew or should have known that these two pieces of information were nonpublic

and, indeed, whether they actually were nonpublic. The question of whether the information actually was public is closely intertwined with the issue of whether the information was material, circumstances arguing for determination of the materiality of the information Levine acquired from Surrey by the trier of fact. Because there are genuine issues of material fact as to materiality, there is no need to analyze separately whether Levine knew or should have known as a matter of law that the information he learned from Surrey was nonpublic.

As Levine argues, there is sufficient evidence that it was a matter of public knowledge that Zurawin was involved in a search for financing for a Desoto acquisition as a result of the prior attempt by Spier and Zurawin to acquire Desoto in early 1989. In early February, Spier's agreement with Shufro was reported along with reports of a possible cash bid. Spier's Schedule 13D disclosed Zurawin's name and his role as a potential future partner of Spier. A February 7, 1989 article appearing in the Chicago Tribune mentions Zurawin by name, identifying him as Spier's partner and describing Zurawin's meeting with DeSoto's chairman.

The Schedule 13D filing also disclosed that the agreement with Shufro was contingent on Spier securing sufficient financing to complete the Desoto acquisition. Even the SEC agrees that Spier's offer was subject to financing.

In light of the fact that the Spier-led takeover attempt was subject to financing and Zurawin was associated publicly with that effort, reasonable investors could disagree about the importance of the fact that Zurawin had approached people such as Surrey or Field about investing in DeSoto. Indeed, it would be quite ordinary for the person who proposed the acquisition to DeSoto's chairman to be pursuing possible investors in a transaction that was contingent on additional financing. The fact that Zurawin, the person publicly identified as Spier's partner, was actually doing so

is not so obviously important that reasonable investors could not differ on the materiality of that fact.

The SEC argues that the fact that Zurawin was trying to arrange financing for a DeSoto transaction is material because the earlier acquisition attempt had "failed" in June 1989 and over four months had elapsed since that time. The SEC bases this argument on an inference drawn from three facts. (1) the fact that the termination of the Shufro agreement in June 1989 was disclosed in the press and in Spier's Schedule 13D amendment; (2) the fact that the Wall Street Journal reported on June 20, 1989, that prospects of a DeSoto takeover had "dimmed"; and (3) the length of time between the apparent demise of the Spier-led attempt and the Levine-Surrey dinner in late October. The SEC infers from these facts that the earlier deal had perished. Therefore, the SEC argues, Zurawin's renewed search for financing was material because it revealed either a new acquisition attempt or a resurrection of the previous failed proposal.

Levine argues, however, that the SEC has offered no undisputed evidence that the earlier takeover attempt had failed to a point where Zurawin's efforts to raise funds would be viewed as material. Levine points out that the June 16, 1989 Amendment No. 4 to Spier's Schedule 13D stated:

"Mr. Spier is continuing to explore and evaluate his alternatives with respect to a possible acquisition of the issuer [DeSoto] or shares of common stock . . . including.. . the possibility of acting with one or more third parties who have expressed an interest in participating in a possible acquisition of [DeSoto] or assisting in providing financing for such a transaction."

(Fake Aff. Ex. J, [Schedule 13D Amendment, dated June 16, 1989] at 3.) No further amendments followed nor was there any public disclosure that Spier or the people associated with him had abandoned their efforts.

While Levine concedes that the Wall Street Journal did report that DeSoto's market price had decreased as "prospects for a takeover of the company grew dimmer[,] he observes that the article did not indicate Spier's efforts had ceased altogether. Levine argues that takeover speculation continued even in the wake of the termination of the Shufro agreement. For example, Paine Webber issued an analysts' report on July 25, 1989, reporting that "[takeover speculation,] not [earnings per share], continues to be the driving force behind the erratic price performance of [DeSoto]" Paine Webber's earlier report dated May 19,1989, had also attributed DeSoto's stock price fluctuations to takeover speculation, and that report describes in detail the Shufro holdings, the agreement with Spier, and Spier's rejected $50 per share cash bid. Moreover, Paine Webber's report dated October 31, 1989, noted "persistent takeover speculation" and disclosed that "Shufro has sought third party help in an effort to profit from its investment in [DeSoto]. "Levine argues that a reasonable inference drawn from the publicly available information is that the Spier-led effort to acquire DeSoto had continued after the termination of the Shufro agreement. It follows that Zurawin's efforts to secure financing for that effort were nothing new and therefore not material.

While it is a close question, the reasonable inferences must be drawn in Levine's favor on a motion for summary judgment. Therefore, in light of the publicly available information about Spier's continuing efforts to secure financing for an acquisition of DeSoto, and that such an effort might involve parties who had expressed interest in participating in such a transaction, combined with public speculation about a possible takeover of DeSoto and the possibility that Shufro had retained a third party to facilitate a transaction, there is a genuine issue of material fact as to whether reasonable investors would agree that the information Levine learned from Surrey was material.

It is true that passage of time between the termination of the Shufro agreement in June of 1989 and Levine's dinner with Surrey in October 1989 is a fact from which one might infer that Zurawin's efforts related to a new deal -- but that is not an inference that must be made as a matter of law. Another reasonable inference would be that the transaction was simply taking time to arrange. After all, the earlier proposal was initially made in early February 1989 and the Shufro agreement was not terminated until five months later. On a motion for summary judgment this inference must be drawn in Levine's favor; it is up to the finder of fact to draw inference suggested by the SEC.

Given the peculiarly factual nature of the questions of fact relating to whether solicitations by Zurawin, a person already known to be associated with Spier, were material based on the information otherwise available from the public filings, press accounts and research, the SEC's motion for summary judgement on Levine's first series of trades of 9,500 shares of DeSoto is denied.

On the other hand, with respect to the second series of trades of 11,000 shares and the information Levine learned from Zurawin himself just before executing those trades, there is no doubt that the fact that something on which Zurawin had been working would be appearing in the newspaper was material nonpublic information as a matter of law.

Levine does not disagree that the fact that Sutton's tender offer for DeSoto was about to be announced was nonpublic information. Nor does Levine contend that information about the timing of a takeover bid is not material. See Musella, 748 F. Supp. at 1040; Materia, 745 F.2d at 199, Tome, 638 F. Supp. at 623. Instead, Levine argues only that Zurawin did not tell him that a tender offer was about to be made and that there is a question of fact about the meaning of Zurawin's statement to the effect that something he had been working on was going to be reported

in the press.

Levine argues that a reasonable investor would be unlikely to have found Zurawin's statement to be important because it is improbable a reasonable investor would recall Zurawin's prior association with Spier and the earlier bid for DeSoto. Levine contends that Zurawin was: "[E]ssentially an anonymous figure. He had no prior public investment exposure, no media exposure and had never before been involved in a tender offer or acquisition attempt. He was unknown to the investing community." (Defendant Michael Levine's memorandum of law in opposition to plaintiff's motion for summary judgment at 19.) This analysis of the "fact" Levine came to possess as a result of the telephone call from Zurawin is overly contrived and does not address the language of Rule 14e-3.

Rule 14e-3 applies to any person "who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic . . . . 17 C.F R. Section 240.14e-3. See United States v. Chestman, 704 F. Supp 451, 458 n.8 (S.D.N.Y. 1989) (Rule 14e-3 requires that "the trader know or has reason to know that the information he received is material and nonpublic.") The analysis of whether a fact is material is not performed in a vacuum. See SEC v. Brethen, No.21 C-3-90-071, 1992 WL 420867, at *17 (S.D. Ohio Oct. 15,1992). Levine had been friends with Zurawin for fourteen years. He was approached earlier that year by Zurawin about a possible investment. Levine testified that he believed Zurawin was involved in financing the accumulation of DeSoto shares, and he admittedly was aware of the information Surrey conveyed to him that Zurawin had approached Surrey and possibly Field about an investment relating to Desoto. Indeed, Levine conceded that Zurawin's telephone call was meaningful in light of what Levine himself already knew: "Zurawin's phone call was like a catalyst again. It was something like, you know, something

he was working on was going to be in the newspaper. So I put two and two together." (Levine Dep. at 351.) Based on Levine's knowledge as of November 8 or 9, the fact that "something" Zurawin was working on was going to become public cannot reasonably be viewed from Levine's perspective as an isolated piece of information concerning an obscure person. To the contrary, the meaning of Zurawin's comment to Levine was unquestionably clear: a transaction relating to Desoto was about to become public. That information was plainly material and nonpublic.

Levine offers no other reasonable interpretation of Zurawin's statement. There is no evidence that Levine mistakenly believed Zurawin was working on something other than an investment related to DeSoto. There is no evidence that Levine possessed information that would cause him to believe that Zurawin was referring to something else. Levine merely asserts that the interpretation of Zurawin's telephone call raises a question of fact because a reasonable investor, and not Levine himself, would not appreciate the meaning of Zurawin's imminent publicity.

The evidence in the record is clear, as was Zurawin's reaction. Immediately after concluding his telephone conversation with Zurawin, Levine purchased 11,000 shares of DeSoto stock. Then, when the market opened the next day after the Sutton tender offer was announced, Levine sold the entire 11,000 shares and realized a profit of more than $70,000. Levine's trading immediately after acquiring nonpublic information from Zurawin is highly supportive of the materiality of that information. See Basic, 485 U.S. at 240 n.18 (trading is an indication of materiality); Maio, 51 F.3d at 637 (same); SEC v. Shapiro, 494 F.2d 1301, 1307 (2d 14 Cir. 1974) (same).

The materiality of Zurawin's comment is unmistakable. In light of what Levine already knew, the fact that "something" that Zurawin had been working on was about to appear in the newspaper was precisely the type of

nonpublic information that is so obviously important that reasonable investors would not disagree about its materiality. Therefore, there is no genuine issue of material fact relating to the information Levine acquired from Zurawin as a result of their telephone conversation on November 8 or 9, and there is no question that information was material and nonpublic, Accordingly, the SEC's motion for summary judgment on its claim against Levine under Section 14(e) of the Exchange Act and Rule 14e-3 is granted with respect to the November 9 and November 10 trades in DeSoto stock.

The SEC also moves for summary judgment on its Section 14(e) and Rule 14e-3 claims based on Levine's alleged "tipping" to defendant Edward Cantor pursuant to the anti-tipping provisions of Rule 14e-3(d). That part SEC's motion is based on the argument that Levine told defendant Schwartz that DeSoto was going to be the subject of a takeover bid and that it was reasonably foreseeable that Schwartz would pass this information to Cantor would trade in DeSoto stock as a result. The questions of fact explained above with respect to the materiality and is nonpublicity of the information Levine acquired from Surrey would also preclude summary judgment on the basis of Levine's alleged "tipping" of that same information to Cantor through Schwartz.

In any event, with respect to the SEC's arguments that Levine indirectly tipped Cantor about the information he acquired from both Surrey and Zurawin, there are questions of fact relating to the reasonable foreseeability of Schwartz passing that information to Cantor. Levine testified at his deposition that he told Schwartz about his belief that DeSoto was going to he the subject of a takeover attempt. (Levine Deposition at 247.) But Levine also understood that his comments to Schwartz were confidential and he was upset when he learned that they had been communicated. Levine denies knowing that Schwartz would convey any information to Cantor. Whether it was

reasonably foreseeable that Schwartz would do so is a genuine issue of material fact that precludes summary judgment on this claim.

The SEC seeks disgorgement as a remedy for Levine's Rule 14e-3 and Section 14(e) violation. Disgorgement of profits derived from unlawful trading activity is designed to ensure that violators do not profit from their unlawful trading and is an appropriate equitable remedy where the SEC has established a violation of the security laws. SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987), cert. denied, 486 U.S. 1014 (1988) Materia, 745 F.2d at 201; Texas Gulf Sulphur, 446 F.2d at 1307-1308.

Additionally, prejudgment interest is appropriate to ensure the violator does not benefit from the time value of his illegal profits. See SEC v. Shah, 92 Civ. 1952, 1993 WL288285, at *6 (S.D.N.Y. July 28, 1993) ("Denying the SEC's request for interest would result in unfair windfall to [the defendant]."); SEC v. Musella, 748 F. Supp. 1028, 1043 23 (S.D.N.Y.), affirmed without opinion, 898 F.2d 138 (2d Cir.), cert denied, 498 U.S. 816 (1990).

There is no dispute that Levine realized a profit of $73,724.21 from his trades on November 9 and 10 on which the SEC has been granted summary judgment, The SEC suggests a rate equal to the floating interest rate used by the Internal Revenue Service to assess interest on underpaid taxes, a rate the SEC has adopted for its own administrative proceedings. See 17 C.F.R. Section 201.600(b). Levine does not dispute this is an appropriate rate. There is authority, however, that the appropriate rate for a district court in New York to award a prejudgment interest is the rate used to calculate prejudgment interest under state law. See Musella, 748 F. Supp. at 1043 (simple rate of 9 percent or all claims arising after June 25, 1981, citing N.Y. Civ.Prac. L. & R. Section 5004), but see Tome, 638 F. Supp. at 627 (awarding interest on disgorged profits at the average prime rate). It is unnecessary to resolve the rate of

prejudgment interest because it is inappropriate at this time to enter partial judgment.

The SEC also seeks summary judgment with respect to its claims for a permanent injunction and civil penalties. Under the circumstances of this case, the SEC is entitled to both.

The SEC seeks to permanently enjoin Levine from any future violation of Section 14(e) of the Exchange Act and Rule 14e-3. The SEC also seeks an injunction with respect to future violations of Section 10(b) and Rule 10b-5, but that is not the subject of this motion. Section 21(d)(1) of the Exchange Act, 15 U.S.C. Section 78u(d)(1), provides, in relevant part, that:

Whenever it shall appear to the SEC that any person is engaged . . . in acts or practices constituting a violation of any provision of this title, [or] the rules or regulations thereunder, . . . it may in its discretion bring an action in the proper district court . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond."

15 U.S.C. Section 78u(d)(1). The SEC need only show a reasonable likelihood that the securities violation will be repeated, Materia, 745 F.2d at 200; SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082 at 1102 (2d Cir. 1972), and "whether the inference that the defendant is likely to repeat the wrong is properly ... drawn depends on the totality of the circumstances, and factors suggesting that the infraction might not have been an isolated occurrence are always relevant." SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975). The factors that may be considered include whether the violation was an isolated occurrence, the degree of the defendant's scienter, the sincerity of the defendant's assurances against future violations, the acknowledgment of past wrongdoing and some degree of remorse, and the likelihood based on the

defendant's professional occupation and that future violations might occur. See SEC v. Commonwealth Chem. Secs., Inc., 574 F.2d 90, 100 (2d Cir. 1978); SEC v. Universal Major Indus. Corp., 546 F.2d 1044, 1048 (2d Cir.1976), cert. denied, 434 U.S. 834 (1977). Injunction may be granted on summary judgment, SEC v. Research Automation Corp., 558 F.2d 31, 33 (2d Cir. 1978).

In this case, a permanent injunction is appropriate. The facts establish that Levine knowingly violated Section 14(e) and Rule 14e-3. There are disputed issues of fact relating to liability for his earlier trades following his dinner with Surrey, but there is no dispute that he made those trades and therefore this is not a case of an isolated incident. Moreover, Levine testified that he purposely did not make further inquiries of either Surrey or Zurawin upon learning from each of them the information at issue in this case.

With respect to Zurawin's telephone call, Levine explained that he did not ask him any questions because "if, in fact, Zurawin was working for an entity, then that would be a violation, and I'm cognizant of that." (Levine Deposition at 279.) Levine also admitted that he knew he was in a "grey area" because he traded on information based, at least in part, on what he learned from Surrey. (Id. at 263.) The circumstances of the November 9 and 10 trades were egregious and warrant an injunction in and of themselves. Levine acquired a substantial amount of stock for nearly half-a-million dollars on the basis of a tip and sold it the next day when the information became public for a quick profit of over $73,000.

Finally, Levine has shown no remorse or acknowledged that his trading on November 9 and 10 was wrongful. Compare SEC v. Bausch & Lomb Inc., 565 F.2d 8, 18-19 (2d Cir. 1977). He testified that he trades large amounts of stock and maintains trading accounts at two brokerage firms. Levine has a substantial income and his

business frequently brings him in contact with corporate executives.

Based on the totality of the circumstances in this case, there is a reasonable likelihood that Levine will violate the securities laws again. Accordingly, a permanent injunction against any future violations of Section 14(e) and Rule 14e-3 is appropriate and the SEC's motion for such an injunction is granted.

With respect to civil penalties pursuant to Section 21A of the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. Section 78u-1(a), the SEC only seeks penalties with respect to Levine's trades on November 9 and 10. The SEC explains that the earlier trades fall outside of the applicable five-year statute of limitations for civil penalties under Section 21A. See 15 U.S.C. Section 78u-l(d)(5). The SEC also seeks penalties based on the trades of defendant Cantor which the SEC argues were made while Cantor possessed material nonpublic information tipped to him from Levine through Schwartz. As explained above, however, there are questions of fact that preclude summary judgment on Levine's liability under Rule 14e-3(d) for Cantor's trades.

The amount of the penalty is to be determined by the Court "in light of the fact[s] and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase, sale, or communication." 15 U.S.C. Section 78u-l(a)(2).

In this case, based on the totality of the circumstances surrounding Levine's trades in DeSoto shares on November 9 and 10, as explained above, it is appropriate to impose the maximum penalty of three times Levine's profit on the trades. Accordingly, the SEC's motion for civil penalties is granted in the amount of $221,172.63, representing three times the profit of $73,724.21 Levine realized on the 11,000 shares he traded on November 9 and 10.

For the foregoing reasons, the SEC's motion for partial summary judgment against Levine for violations of Section 14(e) of the Exchange Act and Rule 14(e)(3) is granted and relief is awarded in the form of disgorgement of profits with prejudgment interest, a permanent injunction against future such violations, and the imposition of civil penalties consistent with this Opinion. Judgment will be deferred, however, pending resolution of all of the claims. There is no basis for entering a partial judgment pursuant to Fed. R. Civ. P. 54(b).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

94 Civ. 8079(JGK)

ORDER

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

EDWARD A. CANTOR, MICHAEL LEVINE, and DAVID P. SCHWARTZ,

Defendants.

APPEARANCES:

For the plaintiff: Richard H. Walker, Esq.
Regional Director
by: Andrew J. Geist,
Gregory L. Fake, Esqs.
Securities and Exchange Commission
Seven World Trade Center
New York, New York 10048
(212) 748-8000

For def. Levine: Bruce I. Afran, Esq.
48 Cuyler Road
Princeton, New Jersey 08540
(609) 924-2075
(609) 924-1045

JOHN G. KOELTL, District Judge:

Having held a hearing on July 30, 1996, the Court hereby orders that the plaintiff's motion for partial summary judgment against defendant Michael Levine for violations of § 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78n(e), and Rule 14e-3, 17 C.F.R. § 240.14e-3, is granted for the reasons stated on the record, and relief is awarded in the form of disgorgement of profits with prejudgment interest, a permanent injunction against future such violations, and the imposition of civil penalties consistent with the opinion read into the record. It is not appropriate under Fed. R. Civ. P. 54 (b) to enter final judgment at this time in light of the pendency of additional claims against defendant Levine.

It is further ordered that (1) defendant Levine's time to move for reargument or rehearing pursuant to S.D.N.Y. Civil Rule 3 (j) shall be extended until August 16, 1996; (2) pretrial submissions (joint Pretrial Order, Proposed Voir Dire, Requests to Charge) shall be submitted by August 30, 1996; and (3) parties shall be ready for trial on forty-eight (48) hours notice on and after August 30, 1996.

SO ORDERED.

Dated: New York, New York
July 30, 1996

John G. Koeltl
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

94 Civ. 8079 (JGK)

- against -

EDWARD A. CANTOR, MICHAEL LEVINE, and DAVID P. SCHWARTZ,

FINAL JUDGMENT OF PERMANENT INJUNCTION AND OTHER RELIEF AGAINST DEFENDANT MICHAEL LEVINE

Defendants.

I.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Levine be and hereby is permanently enjoined and restrained from, directly or indirectly, singly or in concert:

(A) making any untrue statement of a material fact or omitting to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or engaging in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation; or

(B) if any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the

"offering person"), purchasing or selling, or causing to be purchased or sold, while in possession of material information relating to such tender offer which information Defendant Levine knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from the offering person, the issuer of the securities sought or to be sought by such tender offer, or any officer, director, partner, employee or any other person acting on behalf of the offering person or such issuer, any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any such purchase or sale such information and its source are publicly disclosed by press release or otherwise; or

(C) communicating material information relating to a tender offer, which information Defendant Levine knows or has reason to know is nonpublic and knows or has reason to know was acquired directly or indirectly from the offering person, the issuer of the securities sought or to be sought in the tender offer, or any person acting on behalf of the offering person or such issuer, to any other person under circumstances in which it is reasonably foreseeable that such communication is likely to result in the purchase or sale of securities in the manner described in subparagraph (B) above,

in violation of Section 14(e) of the Exchange Act, 15 U.S.C. § 78n(e), or Rule 14e-3 thereunder, 17 C.F.R. § 240.14e-3.

II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Levine shall pay the sum of $137,580.08, representing his trading profits of $73,724.21 plus prejudgment interest thereon of $63,855.87. This sum shall be paid within thirty (30) days after the entry of this Final Judgment. Such payment shall be made in the manner specified in Paragraph IV below.

III.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Levine shall pay $221,172.63 to the United States Treasury ("Treasury") as a civil penalty under the Insider Trading and Securities Fraud Enforcement Act of 1988, 15 U.S.C. § 78u-l(a). This penalty shall be paid within thirty (30) days after the entry of this Final Judgment. Such payment shall be made in the manner specified in Paragraph V below.

IV.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the monies to be paid pursuant to Paragraph 11 of this Final judgment shall be paid in the following manner:

(1) Such funds shall be paid into the registry of this Court by certified check or U.S. Postal Money Order drawn to the order of "Clerk, United States District Court, S.D.N.Y., whereupon the Clerk of this Court, or the Financial Deputy Clerk, is hereby directed to deposit said check or money order into the account for this case with the Court Registry Investment System (the "C.R.I.S. Account"), administered through the United

States District Court for the Southern District of Texas.

(2) Simultaneous with making any payment pursuant to subparagraph (1) above, Defendant Levine shall transmit copies of any certified checks or money orders, front and back, as well as any accompanying correspondence to Andrew J. Wertheim, Esq., Securities and Exchange Commission, Seven World Trade Center, 13th Floor, New York, New York 10048, under cover of a letter that identifies the defendant, the name and civil action number of this litigation, and the name of this Court. The cover letter also shall contain the investigation name (Trading in Securities of Colorado Prime Corp., et al.), the case number assigned by the Commission staff (NY-5876) and identify how much of the payment is disgorgement, how much is prejudgment interest and, if appropriate, how much is postjudgment interest;

(3) Funds in the C.R.I.S. Account shall be held until further order of the Court, to be utilized for payment to persons who submit claims within one year after the date of entry of this Final Judgment and who the Court finds have valid claims arising under the federal securities laws by reason of the conduct alleged against Defendant Levine in the Commission's Complaint.

(4) Interest earned on the C.R.I.S. Account shall be credited to the C.R.I.S. Account and shall thereafter be treated in the same manner as principal.

(5) In the event that no claims are submitted within the one-year period referred to in subparagraph (3) above or that all or any portion of the C.R.I.S. Account remains after adjudication of any claims and disbursement of any funds pursuant to subparagraph (3) above, the remainder shall be disbursed to the Treasury. Any payment to the Treasury under this subparagraph (5) shall be payable to

the Comptroller of the Securities and Exchange Commission, 450 Fifth Street N.W., Washington, D.C. 20549, and transmitted to the Comptroller in the manner described in Paragraph VI below. In no event shall any portion of the C.R.I.S. Account be returned to Defendant Levine, or his agents, successors or assigns, or to any other defendant in this action or in any other action brought by the Commission concerning trading in DeSoto securities, or his or her agents, successors or assigns.

(6) Prior to making any disbursements from the C.R.I.S. Account, the Custodian of the C.R.I.S. Account is directed to deduct from the income on the investment a fee, not exceeding that authority by the Judicial Conference of the United States and set by the Director of the Administrative Office at equal to ten percent (10%) of the income earned for deduction in the investment so held and without further order of the Court.

(7) Copies of this Final Judgment shall be served on the Clerk of the Court or the Financial Deputy Clerk.

V.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the monies to be paid to the Treasury pursuant to Paragraph III of this Final Judgment shall be paid by U.S. postal money order, certified check, bank cashier's check, or bank money order payable to the order of the United States Securities and Exchange Commission. The payment shall be transmitted to the Comptroller, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, under cover of a letter that identifies the defendant, the name and civil action number of

this litigation, and the court in which it was brought. The cover letter also shall contain the investigation name (Trading in Securities of Colorado Prime Corp., et al.), the case number assigned by the Commission staff (NY-5876) and identify that the payment is a civil penalty under the Insider Trading and Securities Fraud Enforcement Act of 1988. A copy of the cover letter and payment shall be simultaneously transmitted to Andrew J. Wertheim, Esq., Securities and Exchange Commission, Seven World Trade Center, New York, New York 10048.

VI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to Fed. R. Civ. P. 65(d), this Final Judgment shall be binding upon Defendant Levine, his agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise.

VII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction of this matter for all purposes, including, but not limited to, implementing and enforcing the terms and conditions of this Final Judgment.

VIII.

The Court expressly determines that there is no just reason for delay in the entry of this Final Judgment. The Clerk of the Court is hereby directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure to enter this Final Judgment forthwith.

SO ORDERED:

Dated:

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20 day of March one thousand nine hundred and ninety-eight.

PRESENT: JON O. NEWMAN,
JOSE A. CABRANES,
Circuit Judges,

DOMINIC J. SQUATRITO
*District Judge.**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

V. No. 97-6056

EDWARD A. CANTOR and DAVID P. SCHWARTZ,
Defendants,

MICHAEL LEVINE,
Defendant-Appellant.

APPEARING FOR APPELLANT: BRUCE I. AFRAN,
Princeton, NJ.

* Of the United States District Court for the District of Connecticut, sitting by designation.

APPEARING FOR APPELLEE: LESLIE E. SMITH, Securities and Exchange Commission, Washington, DC.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York John G. Koeltl, *Judge*) and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Defendant-appellant Michael Levine appeals from judge Koeltl's grant of partial[1] summary judgment in favor of the Securities and Exchange Commission ("SEC") in a civil enforcement action alleging insider trading in violation of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78a *et seq.*, and the SEC regulations promulgated thereunder. Judge Koeltl determined that summary judgment in favor of the SEC was proper as to its claim that Levine had violated Section 14(e) of the Act, and Rule 14e-3 thereunder, when on November 9, 1989 he purchased shares in DeSoto, Inc. while in possession of material, nonpublic information concerning an imminent tender offer for DeSoto stock. On appeal, Levine contests principally the district court's determination that the nonpublic information he possessed was material as a matter of law. We affirm Judge Koeltl's conclusion as to materiality, and hence his entry of judgment in favor of the SEC, substantially for the reasons stated in his July 30, 1996 decision.

Levine also contends that Judge Koeltl abused his discretion by ordering, in addition to disgorgement of Levine's $73,724.21 trading profit plus prejudgment

interest, payment of the maximum civil penalty provided for by Section 21A(a) of the Act-three times Levine's illicit profits. The question before this Court is not whether we would have imposed a different penalty, but whether the penalty imposed was within the range of reasonable options available to the district court. We conclude that it was, and thus find no abuse of the district court's discretion.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

For the Court,
George Lange III, Clerk

By:

[1] Subsequent to Judge Koeltl's grant of summary judgment as to the SEC's Section 14(e) claim with respect to Levine's November 9, 1989 trading activity, the SEC stipulated to the dismissal of its other insider trading claims against Levine, and a final judgment, from which this appeal was taken, was entered on January 27, 1997.

No. 98-0134

Supreme Court, U.S.
FILED
SEP 22 1998
OFFICE OF THE CLERK

In The

Supreme Court of The United States

October Term, 1997

MICHAEL LEVINE,

Petitioner,

- against -

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BRUCE I. AFRAN
Attorney for Petitioner
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Princeton, New Jersey 08540
(609) 924-2075

September 21, 1998

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (5958)

ARGUMENT

United States v. Smith, 1998 WL 527066 (9th Cir. Cal.), reported after the filing of the Petition, has given rise to a conflict between the circuits on an issue central to the determination of liability under the insider trading rules.

In *Smith*, the Ninth Circuit held that the government must "demonstrate that the suspected inside trader *actually used* material non-public information in consummating his transaction." 1998 WL 527066, *17 [emphasis added].

Smith thus places the Ninth Circuit in direct conflict with a decision of the Second Circuit in *United States v. Teicher*, 987 F.2d 112 (2d Cir. 1993), which concluded that "knowing possession" alone is sufficient to sustain a finding of insider trading, 987 F.2d at 119-120, even where the objective evidence does not show actual use or reliance by the defendant on such information.

This issue is directly relevant to the instant case. Levine argued strenuously below that he made no actual use of the statement made by Zurawin in the November 9, 1989 telephone call. Levine testified that he had substantively investigated the stock after selling his first purchase eight days earlier, was seriously considering re-investing in DeSoto at the time of Zurawin's telephone call and, finally, that he did not re-invest in DeSoto until *after* completing additional research, particularly a Reuters survey on the stock. *See Petition for a Writ of Certiorari* at 5-7. Thus, Levine presented an issue of fact as to whether he did "actually use" the Zurawin telephone call in his trading decision.

In response, the government contended that it was irrelevant that Levine may have made no actual use of the statement made by Zurawin. The government argued that merely being

"in possession" of Zurawin's statement was sufficient to debar Levine from trading in the company's stock.

The government's argument was consistent with the approach then prevailing under *Teicher*, *supra*. In *Smith*, however, the Ninth Circuit now rejects the entire panoply of reasoning employed by the Second Circuit in *Teicher*, giving rise to a direct conflict between the circuits as to whether a trader must "actually use" the alleged material non-public information, *Smith*, 1998 WL 527066,*17, or whether mere "knowing possession" of the information at the time of trading, *Teicher*, 987 F.2d at 119-120, is a sufficient basis on which to impute liability.

This dichotomy directly implicates this Court's prior jurisprudence. In rejecting the Second Circuit's analysis in *Teicher*, the Ninth Circuit in *Smith* relied on this Court's formulation in *United States v. O'Hagan*, -- U.S. --, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997), that a deceptive act or practice occurs when the trader "*uses* the information to purchase or sell securities." *Smith*, 1998 WL 527066,*15, *quoting O'Hagan*, 117 S.Ct. at 2209 [emphasis added], and this Court's observation in *Dirks v. SEC*, 463 U.S. 646 (1983), that "a purpose of the securities laws was to eliminate '*use* of inside information for personal advantage.' " *Id.*, *quoting Dirks*, 463 U.S. at 662 [emphasis added]. *Smith* also notes the dictum in *Chiarella v. United States*, 445 U.S. 222 (1980), that "[t]he federal courts have found violations...where corporate insiders *used* undisclosed information for their own benefit." *Id.*, *quoting Chiarella*, 445 U.S. at 229 [emphasis added].

If *Smith* is found to represent the true state of the law as to "use" versus "possession", then Levine's appeal (and the underlying motion for summary judgment) may well have been decided differently since there was most certainly presented an issue of fact as to whether Levine made actual

"use" of information from the Zurawin telephone call. Since *Smith* holds that even *insiders* must be shown to have "actually used" the material non-public information, *Smith*, 1998 WL 527066,*16, the question becomes even more compelling in the government's case against Levine, who was neither a fiduciary nor an insider and, being a dealer in photocopy machines, was never even a participant in the target company's industry, the manufacture of paint.

Consequently, the Petition encompasses issues now brought into dispute between *Teicher* and *Smith*. As shown by the Ninth Circuit's analysis, *see Smith*, 1998 WL 527066,*15, *Teicher* and *Smith* represent diametrically opposite inferences taken by the circuits from this Court's leading jurisprudence in the field of insider trading. Thus, the resolution of this issue will not only settle an issue raised by Levine below, but will clarify the law and achieve uniform decisions among the circuits.

CONCLUSION

For these additional reasons, a writ of certiorari should be issued to review the opinion and judgment of the United States Court of Appeals.

Respectfully submitted,

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609-924-2075

Counsel of Record and
Attorney for Petitioner
Michael Levine

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